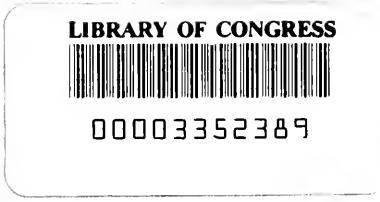

Is Virginia Entitled to Compensation for the Cession of the Northwest Territory to the National Government?

PAPER READ

BY

MR. E. HILTON JACKSON
OF WASHINGTON, D. C.

BEFORE THE

Virginia State Bar Association

AT THE HOTEL CHAMBERLIN,
OLD POINT, VA.
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A FORE WORD.

In a paper of this character it is not easy to trace the sources of information which enter into the conclusions reached, still some effort in this direction should be made, because of the labors of those who have preceded the writer in this interesting line of investigation.

The mere suggestion that the State of Virginia, representing herself and the other thirteen colonies, has a just claim against the nation approximating the enormous sum of two hundred million dollars and that any Court clothed with the necessary jurisdiction to hear and determine the law and facts involved would in all probability make such an award is a question that has hitherto escaped both the attention of the historian and the acumen of the legal profession. It is not believed, however, that the inattention to which this matter has been subjected for a century and a quarter relieves the Nation of the duty of discharging a just liability, if such liability is found to exist, or the States vitally concerned from the responsibility of pressing this claim upon its attention.

The writer's interest in this general subject was first aroused in 1906 when he was engaged in the preparation of a paper, afterwards read before this Association, entitled "The Dismemberment of Virginia," at which time the imperial colonial possessions of Virginia were found to be surpassed only by her striking generosity in ceding these possessions to the Nation at a time when their retention by her would have postponed indefinitely, if not forever, the establishment in the western hemisphere of a republic upon the federal principle. Nor is this generosity in any wise diminished, if it be found that a fair interpretation of the language of the deed of cession discloses that the nation thereby became a trustee of a large part of this territory for the benefit of Virginia and the remaining thirteen colonies, with respect to which trust there has been no accounting whatever by the nation in favor of the states interested.

More recently the writer's attention was directed to this subject by the bill introduced in the Senate on April 10, 1912, by

Senator Chilton, of West Virginia, "TO PROVIDE FOR THE BRINGING OF SUITS AGAINST THE UNITED STATES BY VIRGINIA, WEST VIRGINIA, KENTUCKY" and the remaining thirteen colonies.

The bill had its indirect origin in a detailed statement of the claim compiled by Dr. R. B. Fulton and subsequently used as the basis of a message of Governor Claude A. Swanson, dated January 24, 1910, to the GENERAL ASSEMBLY OF VIRGINIA, suggesting that it take appropriate action to have the claim adjudicated.

The public documents bearing upon the question of Virginia's title to the land ceded and the disposition made thereof by Congress may be found in the History of the Public Domain by Donaldson, and the Land Laws of the United States, which have been of untold value in the preparation of this paper.

Some of the sources of information to which the writer is indebted are: "The Northwest Under Three Flags," *Charles Moore*, "Ordinance of 1787," *Edward Coles*, "Critical Period of American History," *John Fiske*, "Maryland's Influence Upon Land Cessions to the United States," *H. B. Adams*, "Ordinance of 1787," *F. D. Stone*, "The Old Northwest," *Hindsale*, "Twenty Years in Congress," *Blaine*, "Handley's Lessee v. Anthony, 5 Wheaton, Johnson v. McIntosh, 8 Wheaton, Commonwealth v. Garner, 3 Grattan, Hening's Statutes at large, *Virginia*.

The writer has been unable to persuade himself that some way cannot be found whereby West Virginia, Kentucky and the thirteen States may co-operate, through their representatives in Congress, to the end that some just and equitable settlement may be made.

While the method of settlement herein suggested contemplates that the claim may be more satisfactorily disposed of by some already existing tribunal previously clothed with jurisdiction to hear and determine all the issues of fact and law involved, yet, to the writer's mind the method adopted is of no great importance.

E. Hilton Jackson.

Is Virginia Entitled to Compensation for the Cession of the Northwest Territory to the National Government?

PAPER READ BY MR. E. HILTON JACKSON, OF WASHINGTON, D. C.

I.

THE TITLE OF VIRGINIA TO THE NORTHWEST TERRITORY EMBRACED IN THE DEED OF CESSION OF MARCH 1, 1784.

It would be signal error to suppose that Virginia contributed only men and measures to the making of this nation. From her original territory, known as Raleigh's Virginia, extending from the Floridas to Canada, New England, New Netherlands, Maryland and the Carolinas, had been taken by successive charters, still leaving, however, her domain sufficiently ample to ensure to her the proud title of "The Mother of the States." After being thus dismembered, she, by voluntary deed of cession of March 1, 1784, duly signed, sealed and delivered by her accredited representatives in the Continental Congress, gave to the nation an empire larger than any in Europe save Russia, comprising an area washed on its triangular sides by three thousand miles of navigable waters, on the north by the Great Lakes, embracing one-half of the fresh water of the globe, and on the west by a river whose volume equals that of all the rivers of Europe save only the Volga. Some slight conception of the ex-

tent and importance of this cession may be had when we reflect that the territory thus ceded contains by United States survey 265,878 square miles, or 170,208,613 acres, and that out of it the great States of Ohio, Indiana, Illinois, Michigan, Wisconsin, and all of Minnesota lying east of the Mississippi have been formed—a territory that played a more important part in the subsequent history of this nation than all other acquisitions, and, as incidental to the mighty role, has furnished three of the Chief Justices and eight of the Chief Magistrates of the Republic. One of the latter, to-wit, James A. Garfield, has made a valuable contribution to this subject in the form of an address, entitled "The Northwest Territory and the Western Reserve."

Before the other issues raised by this subject can be adequately considered, Virginia's title to this vast region must be subjected to impartial scrutiny. Did she have anything to give? Was her title, however acquired, such as to enable the nation to whom it was ceded to hold it against all comers? Or was this title a mere inchoate and ill-defined claim, giving to the sovereign grantee only a mere right of action that thereafter must be reduced to possession and ownership? No full answer can be made to these inquiries without examination into the several methods of acquiring title to territory on the North American Continent.

The European nations interested in the acquisition and exploitation of land in the Western Hemisphere gave full assent to the doctrine that discovery gave title to the government by whose subjects it was made against all other nations, and that this title might afterwards be perfected by possession. Not the slightest difficulty was found in disposing of the title of the original inhabitants, who, after such discovery and occupation, were held by principles of international law, recognized at the first opportunity by the Supreme Court of the United States, to have only a right to its use and occupancy, the consideration apparently going to these benighted peoples in exchange for the unlimited independence theretofore enjoyed, being the blessings of civilization and Christianity—a boon which they neither sought nor desired. It followed as a natural sequence that any of the European nations, having thus acquired lands, might convey by grant or otherwise a good title thereto, subject only to

the Indian right of occupancy, the discovery also giving to the discovering nation the exclusive right to extinguish the Indian right of occupancy either by purchase or conquest. How far this title has thus been extinguished let history answer. England granted a commission, during the reign of Henry VII to Sebastian Cabot in 1496, to discover countries unknown to Christian people and to take possession of them in the name of her king. Two years later Cabot discovered the Continent of North America, sailing as far south as Virginia, and to this discovery the English trace their title. This doctrine later found recognition in the charter granted to Sir Humphrey Gilbert in 1578, which authorized him to discover and to take possession of such heathen lands as were not actually possessed by any Christian prince or people. This charter was afterwards renewed, in substance, by Queen Elizabeth to Sir Walter Raleigh in 1585. France, it may be asserted from a fair reading of history, first occupied the Northwest and established her trade from the St. Lawrence to the Mississippi, and it was not until a century later that the English Colonies, chiefly Virginia, having crossed the Alleghanies, came into collision with France. To some extent, however, the discovery and occupation by France and Great Britain of the territory east and west of the Mississippi was contemporaneous and involved these nations in contests which were not settled until the treaty of Paris in 1763. By this treaty the Mississippi was irrevocably fixed as the boundary line between the territories of France and Great Britain. With the checkered career of the territory thus ceded to France and afterwards known as the "Louisiana Purchase", the title to which, owing to the necessities of the First Napoleon, became vested in the United States April 30, 1803, this paper has nothing to do. We are alone interested at this time in fixing the title of the Northwest territory in Great Britain by the treaty of Paris, thus vitalizing and giving definition to the language of the charter of Virginia, which was broad enough to cover any territory in the Northwest, the title to which was recognized to be in Great Britain. At this time Virginia, being a royal colony, became the repository of whatever title Great Britain possessed.

The settlement in Jamestown in 1607 was made pursuant to

the terms of a charter granted April 10th, 1606, by James I, but soon thereafter, May 23d, 1609, the first charter proving unsatisfactory, the same sovereign issued a second charter, in which the metes and bounds of the Colony were specifically set forth as follows: "Situate, lying and being in that part of America called Virginia, from the point of land called Cape or Point Comfort, all along the sea coast to the northward 200 miles, and from the said point of Cape Comfort all along the sea coast to the southward 200 miles and all that space and circuit of land lying from the sea coast of the precinct aforesaid up into the land throughout *from sea to sea.*"

A third charter, dated March 12th, 1612, annexed to Virginia all the islands within three hundred leagues of the coast. These three charters were vacated, but both James I and Charles I expressly declared that the annulling of the charters simply abolished the sovereignty that had been ceded to the Virginia Company and did not infringe or diminish the territorial rights of the colony.

Subsequently other charters were granted by Great Britain to the colonies of Maryland, Pennsylvania, and North and South Carolina, with the result that the different colonies claimed ownership of the same territory, and often claimed under conflicting authorities, growing out of the ill-defined grants made by the different sovereigns of Great Britain covering land in America, in royal ignorance of the extent and configuration of these lands. After her organization into a sovereign State, Virginia did much to end the controversy between herself and the above mentioned States, by incorporating a provision in her first Constitution adopted June 29, 1776, as follows:

> "The territories contained within the charters erecting the colonies of Maryland, Pennsylvania, North and South Carolina, are hereby ceded, released and forever confirmed to the people of these colonies, respectively, with all the right of property, jurisdiction and government, and all other rights whatsoever which might at any time heretofore been claimed by Virginia, excepting the free navigation and use of the rivers Potomack and Pohomoke with the property

of the Virginia shores or strands bordering on either of said rivers, and all improvements which have been or shall be made thereon.

"The western and northern extent of Virginia shall in all other respects stand as fixed by the charter of King James I, in the year 1609, and by the public treaty of peace between the courts of Great Britain and France in the year 1763, unless by act of legislature one or more territories shall hereafter be laid off and governments established westward of the Alleghany Mountains. And no purchase of land shall be made of the Indian natives but on behalf of the public by authority of the General Assembly."

It will thus be seen that Virginia forever released all her claim heretofore asserted to jurisdiction and property rights embraced in the charters of these particular colonies and at the same time reaffirmed her own charter rights to the Northwest territory bounded by the Ohio and Mississippi, with an indefinite extension northwest of the Ohio River. This left open, however, the controversy between Virginia and such States as New York, Massachusetts and Connecticut, which had large claims to Western lands, some of which overlapped Virginia territory. This particular controversy could have had but one result, in view of the indisputable record that this territory was never within the chartered limits of any other colony or State or declared to be so by any State in her declaration of independence, and, it being conceded that the Confederation as such had acquired no land by the War of the Revolution, it of necessity follows if the territory did not belong to Virginia, it did not belong to the United States.

Not content to rely upon charter rights the Legislature of Virginia had exercised many acts of dominion over this region. She created the counties of Orange in 1734, of Augusta in 1738, of Botetourt in 1769, "bounded west by the utmost limits of Virginia." In this act it was also recited that the people in this county on the waters of the Mississippi were very remote from the Court House. Another county, that of Fincastle, extended to the Ohio, and embraced Kentucky. At the time of the De-

claration of Independence these counties, bordering on the Ohio and the Mississippi, were represented in the convention that framed the first Constitution of the State. From 1752 to 1755 the legislature passed acts encouraging persons to settle in this region, and Marshall's Life of Washington is authority for the statement that the grant made to the Ohio Company was made as a part of Virginia; while numerous other grants were made in the Colonial period.

Her title to the Northwest territory was further strengthened by conquest, and the Commonwealth, acting through its governor and council, commissioned one of its own citizens, George Rogers Clarke, who, in command of her own troops during the years 1778 and 1779, captured all the British posts within the confines of this territory, with the exception of those immediately bordering on the Great Lakes, and held the same in her own name. By this expedition, "commanded by a Virginian, at the head of a Virginia army, financed by Virginia," this territory was won, thereby terminating the British occupation and materially contributing to the final victory won by the Colonial army under the command of Washington at Yorktown. During the governorship of Patrick Henry, the Legislature in October, 1778, organized the entire territory into Illinois county and soon thereafter Governor Henry made provision for its government by appointing and giving instructions to a lieutenant commander, and the State continued in actual control and possession until the cession to the Federal Government and the latter's acceptance thereof.

If further evidence of the title of Virginia were required it *may* be found in the recognition of its validity by the Supreme Court of the United States in two notable decisions. In the first, *decided* in 1818, Handley's *Lessee* v. *Anthony*, 5 Wheat. 667, there was a dispute involving the question of the jurisdiction of the State of Kentucky over a portion of land in the shape of a peninsula on the northwest bank of the Ohio River. The court, speaking through Chief Justice Marshall, based its decision against the validity of the claim of Kentucky on the grant of Virginia to Congress of the territory in her deed of cession, as follows: "Situate, lying and being northwest of the Ohio River."

The disputed tract, therefore, being in the State of Indiana, one of the States carved out of the territory thus ceded, the court held to be clearly comprehended by Virginia's cession, thus by effective reference recognizing Virginia's title to all the territory embraced in said deed. In the second case, *Johnson* v. *McIntosh*, 8 Wheat., decided in 1823, in which Daniel Webster appeared as counsel for the successful litigant, the court, *again* speaking through Chief Justice Marshall, denied the validity of a title to lands within the northwest territory derived solely from the grant of an Indian tribe, on the ground that by the treaty of 1783, concluding the War of the Revolution, Great Britain relinquished her claim to the proprietary and territorial rights of the United States, and by this same treaty the right to the soil previously in Great Britain passed to the several States. That Virginia's title to the Northwest territory was thereafter subject only to the right of occupancy of the Indians, and that the right to extinguish said occupancy was vested alone in that State, and therefore any grant of such soil by an Indian tribe without the concurrence of Virginia was null and void.

In the case of the *Commonwealth* v. *Garner*, et al., a case decided by the General Court of Virginia, reported in 3 Gratt. 655, the title of Virginia to this territory is abundantly established and the decision of the Supreme Court cited above adopted. In this case the contention was raised by Hon. Samuel F. Vinton, on behalf of Ohio, that the title to this territory was never in Virginia. But the court, in disposing of this contention, not only completely established Virginia's title, but also disposes of this extraordinary contention with the conclusive suggestion that the title of Ohio, whatever it was, was derived from Virginia, and therefore the former was estopped to deny the title of the latter. It is believed that this opinion, occupying one hundred and thirty pages of the printed report, constitutes the most valuable contribution extant upon the historical and legal aspects of Virginia's title.

The Continental Congress in framing the Articles of Confederation to be submitted to the several States for their acceptance confirmed Virginia's title by inserting a clause to the ef-

fect that "no State shall be deprived of territory for the benefit of the United States."

At the time the treaty of peace of 1783 was negotiated there was much anxiety as to whether the western lands should be comprehended in this treaty. The American Commissioners put forward two views, namely, that this land was included and embraced within the limits of Virginia's charter of 1609, and that it was also in the actual occupancy and possession of Virginia, having been conquered by her troops under the expedition of George Rogers Clarke. The result of this double claim made by the American Commissioners was to embrace this territory in the treaty of cession, and, without attempting to decide which view prevailed, it was exceedingly fortunate that this region was in the possession of Virginia troops at the close of the Revolutionary War.

II.

The Circumstances Culminating in the Cession of the Northwest Territory by Virginia.

A brief survey of the relative area of the original thirteen States is necessary in order to a correct understanding of the influences operating to bring the Northwest territory under national control. For convenience these States may be divided into claimant and non-claimant States, the former *only* claiming western lands. The combined area of the six non-claimant States, to-wit, New Hampshire, New Jersey, Rhode Island, Delaware, Pennsylvania and Maryland, was 49,976,000 acres, while the combined area of the claimant States, to-wit, New York, Massachusetts, Connecticut, North Carolina, South Carolina, Georgia and Virginia, was 152,025,280 acres. To this must be added the 53,052,880 acres within the boundaries of Kentucky, Vermont and Maine, which States were erected out of territory claimed respectively by Virginia, New York, Massachusetts and New Hampshire by virtue of grants from the British crown prior to the Revolution.

To the area of the claimant States must be added their western lands, aggregating 259,171,789 acres.

The grand total, therefore, of the acreage of the claimant States was 464,247,949 acres, as against only 49,976,000 acres within the area of the non-claimant States. Virginia's area alone amounted to 218,866,533 acres, which was thirty-one times as large as that of Maryland, and two hundred and ten times as large as that of Delaware, and two hundred and sixty times as large as that of Rhode Island.

The comparative area of the lands of the claimant and non-claimant States was not the only difficulty, inasmuch as between the claimant States rival claims were put forward to the same territory, growing out of conflicting grants made by different sovereigns of Great Britain for lands in America already adverted to. These royal grants covered the face of portions of territories of some of the colonies with titles and claims five deep. These questions not only prevented full concert of action among the several States prior to the adoption of the Constitution, but gave rise to controversies that seemed impossible of adjustment, leading at least one historian to remark that the only boundary line of the original thirteen colonies not the subject of controversy was that on the east, to-wit, the Atlantic Ocean. Scenting danger, the claimant States caused to be inserted in the Articles of Confederation on October 27, 1777, a declaration to the effect that the Continental Congress should be the last resort on appeal, in all disputes and differences between two or more States concerning boundaries, jurisdiction, or any other cause whatever, with an elaborate machinery for the exercise of such jurisdiction. It does not appear that the determination of any such controversy was ever submitted to Congress, and, in view of the cumbersome machinery provided and the jealousy of the States, it is not at all probable, if such a question had been submitted, that any conclusion satisfactory to the claimant States could have been reached.

Another question of vast magnitude grew out of the helplessness of the Continental Congress in the matter of taxation and revenue, and tended to draw public attention to the lands of the Northwest as a source of revenue. The Congress having no power to levy a direct tax and no means of enforcing against a State its proportionate share of the expenditures incurred in the

common defense or general welfare, these lands as early as 1776 were looked to "as a resource amply adequate, under proper regulations, for defraying the whole expenses of the war." The financial embarrassment of the country had not grown less upon the completion of the Articles of Confederation and, more and more was the public mind being directed to these lands as a means of relief. On July 31, 1782, a committee of one from each State reported to Congress "that the western lands, if ceded to the United States, might contribute toward a fund for paying the debt of these States," but a substitute for this part of the report was embodied in a resolution declaring that the cession of these lands "would be an important fund for the discharge of the national debt." While neither of the above recommendations was actually adopted, yet their serious consideration by Congress shows that the *national* idea was gaining ground.

Having thus demonstrated the hopeless character of the land controversy into which the claimant States were about to be plunged, if left alone to adjust their own differences, the overshadowing influence of the claimant States in the Confederation, which time would not diminish, as well as the important bearing of these lands upon the public revenue, when once under national control, it now becomes pertinent to trace the more immediate steps looking to the result. Hinsdale in "The Old Northwest" points out that at various times four different ideas as to the western lands were suggested. The original idea of the claimant States was to retain them for their own exclusive use; second, it was proposed to distribute the lands or their proceeds among all the States in whole or in part, leaving the question of jurisdiction with the claimant States. The third proposition might be termed the Maryland idea, to-wit, that Congress should assert the sovereign power of the United States over the western lands without waiting for State cessions. The last plan, that of voluntary cession by the States was the one ultimately adopted. The first two plans soon passed out of consideration as not meeting the exigencies of the situation, and the last two, that of an assertion of national sovereignty and that of voluntary State session, were now brought promptly forward. Parenthetically, it should be observed that there could be no national-

ization of these lands as long as the Confederation lasted, inasmuch as the Articles gave Congress no resources whatever, except as same might come to it by way and in the name of the States.

To Maryland must be given credit of first calling official attention of the nation to the gravity of the situation. On October 15, 1777, a month prior to the completion of the Articles of Confederation, the following proposition, receiving only the single vote of Maryland, was offered: "That the United States in Congress assembled shall have the sole and exclusive right and power to ascertain and fix the western boundary of such States as claim to the Mississippi or South Sea and lay out the land beyond the boundary so ascertained into separate and independent States, from time to time, as the numbers and circumstances of the people thereof may require." Congress in June, 1778, following the submission of the Articles of Confederation on November 17, 1777, to the States for their ratification, was engaged in the discussion of the objections of certain of the States to these Articles. At this critical juncture the State of Maryland in two separate resolutions passed respectively on June 22d and December 15th, 1778, proposed that the boundary of the claimant States should be curtailed and defined, and that the western territory should be held for the benefit of all the States. From that time until the 2d day of February, 1781, Maryland refused to instruct her delegates to agree to the Articles of Confederation. On May 21, 1779, through her representatives in the Continental Congress, Maryland laid before that body certain instructions to its delegates, George Plater, William Paca, William Carmichael, John Henry, James Forbes, and Daniel, of St. Thomas, Jenifer. In this document it was pointed out that Virginia had it within her power by selling a small portion of these lands to greatly replenish her own treasury, reduce her taxes and thus, with lands comparatively cheap and taxes comparatively low, the neighboring State of Maryland would be deprived by emigration of its most useful citizens and its importance in the confederated States would sink to a comparatively low level. An effort was also made in this document to show that Virginia had no title to these lands, and instructions were therein given to her

delegates that she, herself, would not ratify these Articles until she received some distinct assurance that the territory would become common property of the United States and "subject to be parcelled out by Congress into free, convenient and independent governments." Delaware followed this initiative, and on February 23, 1779, presented to Congress a series of resolutions passed by the Legislature of that State, putting forward the proposition that these lands should be held by the United States on terms alike beneficial to all the States.

It will thus be seen that the protest of Maryland as finally presented to Congress on May 21, 1779, involved two propositions, which will now be the subject of inquiry, to-wit, that the Continental Congress had the right to assume sovereignty over this territory, and, second, that the entire Northwest territory acquired from Great Britain by the treaty of 1783 was secured by the common blood and treasure of the whole people, and therefore should be held by the general government for their benefit. It is not surprising that all the other non-claimants States, to-wit, New Jersey, Delaware, Pennsylvania, Rhode Island and New Hampshire, found themselves in full accord with the Maryland idea. Virginia, always foremost in asserting both her own rights and those of the nation, sharply defined her own position, and made answer through her General Assembly on December 14, 1779, at which time she addressed to the delegates of the United States in Congress assembled a remonstrance against the merits of the issues thus raised by Maryland. In this remonstrance, after expressing her determination, on all occasions, "to manifest her attachment to the common interests of America, and her earnest wish to remove every cause of jealousy and promote that mutual confidence and harmony between the different States so essential to their true interest and safety," she set forth her position in language too cogent and perspicuous to admit of abridgment:

> "Should Congress assume a jurisdiction, and arrogate to themselves a right of adjudication, not only unwarranted by law, but expressly contrary to the fundamental principles of the Confederation; superseding or controlling the

> internal policy, civil regulations, and municipal laws of this or any other State, it would be a violation of public faith, introduce a most dangerous precedent, which might hereafter be urged to deprive of territory or subvert the sovereignty and government of any one or more of the United States, and establish in Congress a power which in process of time must degenerate into an intolerable despotism." . . .
>
> . . . "The United States hold no territory but in the right of some individual State in the Union; the territory of each State from time immemorial hath been fixed and determined by their respective charters, there being no other rule or criterion to judge by; should these in any instance (when there is no disputed territory between particular States) be abridged without the consent of the States affected by it, general confusion must ensue; each State would be subjected in its turn to the encroachments of the others; and a field opened for future wars and bloodshed; nor can any arguments be fairly urged to prove that any particular tract of country, within the limits claimed by Congress on behalf of the United States, is not part of the chartered territory of some one of them, but must militate with equal force against the right of the United States in general; and tend to prove such tract of country (if northwest of the Ohio River) part of the British Province of Canada. When Virginia acceded to the Articles of Confederation her rights of sovereignty and jurisdiction within her own territory were reserved and secured to her, and cannot now be infringed or altered without her consent."

The position thus set forth on behalf of the old Commonwealth was the one finally acquiesced in by the Continental Congress, for it was manifest that the adoption of the Maryland idea, to-wit, an assertion of national sovereignty over the lands in question, would have been to overthrow the Confederation and to wreck the cause of independence.

In connection with the above Remonstrance of Virginia it is important to recall that the Continental Congress neither in its relations with Great Britain nor with any of the States, ever

adopted the Maryland idea by making the national claim to this territory, and never took the position that these lands had been wrested from the common enemy by the common blood and treasure of the colonies. On the contrary, in the very instructions given by the Continental Congress more than a year before the date of Virginia's cession to Mr. Adams, who was one of the Commissioners to negotiate the treaty of 1783, the position of the colonies was stated in the very words set forth in the Virginia Remonstrance and already quoted: "The United States hold no territory but in the right of some one individual State in the Union; the territory of each State from time immemorial hath been fixed and determined by their respective charters, there being no other rule or criterion by which to judge." There was no means of enforcing a claim of jurisdiction over these lands by Congress apart from the fact that such an attempt was contrary to the express terms of the Articles of Confederation. It is inconceivable that a combination of the non-claimant States could have been made strong enough to enforce such a claim against the claimant States of Massachusetts, New York, Connecticut, Virginia, North and South Carolina and Georgia. So that Congress on the one hand was powerless to induce Maryland to subscribe to the Articles of Confederation, and, on the other, the Articles of Confederation left to the States the absolute control and ownership of their western lands, the power of Congress being expressly limited in Article 9 as to the settlement of boundary disputes between States. In the meanwhile Virginia, finding herself by the Articles of Confederation in the exclusive control and ownership and desirous of defraying the expenses of the Clarke expedition, opened a land office, granted bounties, and otherwise proceeded to dispose of these lands. In recognition of the general discontent the Continental Congress, on October 30, 1779, passed by a vote of eight States to three, a resolution, subsequently transmitted to the different States, recommending to Virginia and other States similarly circumstanced the propriety of forbearing the further issuance of warrants for unappropriated lands during the continuance of the War of the Revolution. The first State to respond to this recommendation was New York, whose delegates on March 30, 1780,

presented to the Continental Congress an act of its Legislature offering to cede to the United States all territory in the West claimed by New York. This act was not fully carried into effect until March 1, 1781. While the prompt action of New York had a good moral effect upon the other States invited to surrender their territory, yet no impartial consideration can lose sight of the fact that the title of New York to any of these western lands was exceedingly questionable, consisting of a mere claim based wholly upon title derived by treaty with the Algonquin tribes and the Six Nations, a title which the Supreme Court of the United States, in the case of *Johnson* v. *McIntosh*, *supra*, declared did not extend beyond the Indian right of occupancy, and was held to be subservient to the charter rights of Virginia.

A reading of the documents covering the history of this period has convinced the writer that the appeal, which proved irresistible to the Commonwealth of Virginia, was contained in the language of the report agreed to by the Continental Congress after a full consideration of the entire subject, including the refusal of Maryland to subscribe to the Articles of Confederation and the action of New York therefore ceding her territory. Some of the language of this report in lofty patriotism dignified appeal to sovereign States to make sacrifice for the Commonwealth, and in clear conception of the overshadowing importance of the national control of this vast domain has been rarely equalled by any public paper bearing upon the creation and establishment of any government. In part this action of Congress, taken on September 6, 1780, is as follows:

> "That it appears more advisable to press upon these States, which can remove the embarrassments respecting the western country, a liberal surrender of a portion of their territorial claims, since they cannot be preserved entire without endangering the stability of the general Confederacy; to remind them how indispensably necessary it is to establish the Federal Union on a fixed and permanent basis and on principles acceptable to all its respective members; how essential to public credit and confidence, to the support of our army, to the vigor of our councils, and success of our

> measures; to our tranquillity at home, our reputation abroad, to our very existence as a free, sovereign and independent people; that they are fully persuaded the wisdom of the respective legislatures will lead them to a full and impartial consideration of a subject so interesting to the United States and so necessary to the happy establishment of the Federal Union."

A resolution embodied in the foregoing report directing that the same be transmitted to the legislatures of the several States recommended: "To those States who have claims to the western country to pass such laws, and give their delegates in Congress such powers as may effectually remove the only obstacle to a final ratification of the Articles of Confederation."

On October 10, 1780, Congress made more definite its former action by resolution to the following effect:

> "*Resolved*, That the unappropriated lands that may be ceded or relinquished to the United States, by any particular State, pursuant to the recommendation of Congress on the 6th day of September last, shall be disposed of for the common benefit of the United States, and be settled and formed into distinct Republican States, which shall become members of the Federal Union, and have the same rights of sovereignty, freedom and independence as the other States."

A proud but generous Commonwealth, always ready to make sacrifices, "to establish the Federal Union on a fixed and permanent basis," could not lend a deaf ear to such an appeal, and on the following January 2, 1781, presumably taking the first opportunity to respond, submitted a proposition for the cession of the western lands. In addition to the reservations, six in all, which were actually set forth in the deed of cession executed three years later, and which will be hereafter more specifically referred to, Virginia by the foregoing resolution made one condition of the proposed grant, which upon principle was inadmissible, and from which she, herself, afterward receded. This condition was set forth as follows:

> "That all the remaining territory of Virginia included between the Atlantic Ocean and the southeast side of the River Ohio, and Maryland, Pennsylvania and North Carolina boundaries, shall be guaranteed to the Commonwealth of Virginia by the said United States, and that all purchases and deeds from the Indians of any lands within the cession should be declared absolutely void."

Clearly these two conditions, if agreed to, would involve a declaration by Congress as to the validity of Virginia's title to the Northwest, and a ruling out of the claims of New York and perhaps of Connecticut and Massachusetts, and thus be a radical departure from the policy of Congress in uniformly declining to pass upon the relative claims of sovereign States to lands, a cession of which this same Congress was inviting but not demanding for the general good. Nor was Virginia supported in insisting upon this guarantee by her public men. Madison in a letter to John Randolph of August 13, 1782, said:

"Every review I take of the western territory produces fresh conviction that it is the true policy of Virginia, as well as of the United States, to bring the dispute to a friendly compromise," and further expressed the hope that Virginia's demand for a guarantee be relaxed. This guarantee was later characterized by Congress in a committee report adopted on September 18, 1782, to be either unreasonable or unnecessary, inasmuch as if the land above mentioned is really the property of the State of Virginia, it is sufficiently secured by the Confederation and if it is not the property of that State, there is no reason or consideration for such guarantee. In March, 1781, two important transactions were consummated. The Maryland delegates, being therefore empowered by her Legislature, ratified the Articles of Confederation, relying on the justice of the States upon the question of cession, and the New York delegates executed the deed of cession to the western lands claimed by that State. That Maryland was justified by this reliance is disclosed by the subsequent cession of Virginia and the other claimant States. This long controversy was ended by Virginia's deed of cession on

March 1, 1784, eliminating the above guarantee, the deed being executed and delivered by her delegates in the Continental Congress, to-wit, Thomas Jefferson, Samuel Hardy, Arthur Lee and James Monroe. This deed was written wholly in the handwriting of Thomas Jefferson.

To the bold initiative of Maryland too much credit cannot be given, for in thus centering public attention upon the much vexed land question other causes were set in motion which accomplished the result aimed at by Maryland, but by another and more orderly route. While Maryland was lodging her protests in Congress, Virginia with an army of her own, entirely independent of her full quota of soldiers to the War of the Revolution, was actually engaged in the successful conquest of the very territory which was the subject of controversy, and one striking result of the George Rogers Clarke expedition was to protect the Maryland frontier from hostile attack.

The State of Massachusetts made cession of her western lands on April 19, 1783, the State of Connecticut on September 3, 1786, but did not make jurisdictional cession of the Western Reserve until May 30, 1800. Subsequently South Carolina ceded her western lands on August 9, 1787, North Carolina on February 25, 1790, and Georgia on April 24, 1802.

It will thus be seen that Virginia was the first State to cede Northwest lands, the title to which was undisputed, thus marking an important advance towards establishing a government, bound together otherwise than by "a rope of sand," and thus the way was paved for the passage of the famous ordinance of 1787, whereby this territory was organized into a government forever dedicated to freedom.

III.

Were Any Rights Reserved to Virginia Under and by Virtue of the Deed of Cession of March 1, 1784?

The crux of the whole question is involved in a true answer to this inquiry, because, if the title conveyed by Virginia was in fee simple and indefeasible, as historians and statesmen have com-

monly supposed, and divorced in all respects from any conditions or reservations, either expressed in the deed or implied in a fair construction thereof, then the interrogatory which forms the subject of this paper, must be resolved in the negative, and the question becomes purely an academic one, shorn of all vitality, and this State must also in such an event rest content in the mere retrospective contemplation of her generous relinquishment of territory, without which it is fair to assume the launching of this nation would have been less auspicious, and in the further contemplation that the territory thus ceded, by reason of its increasing population, expanding resources, and the governments there established, has exerted such a mighty influence in forming a Union of independent, sovereign and indestructible Commonwealths; whereas, an affirmative answer to this interrogatory puts flesh on the skeleton, breath into its nostrils, and clothes the whole controversy with present and human interest, paving the way for the consideration of other questions, which must still be resolved before this claim becomes justiciable and therefore of such a character as may be submitted for adjudication to some tribunal clothed with power to hear and to determine all the issues involved.

At this point it is pertinent to call attention to certain distinct conditions in the deed of cession recognized by all as binding upon the United States. These may be broadly stated as follows:

1. That the territory thus ceded shall be laid out and formed into States distinctly republican and having all the rights of sovereignty enjoyed by other States.

2. That the reasonable expenses incurred by Virginia in conquering this territory from the British, in maintaining garrisons therein or otherwise in acquiring any portions thereof shall be fully reimbursed by the United States.

3. That the French and Canadian inhabitants and other settlers, professing themselves to be citizens of Virginia, shall have their titles and possession confirmed in them and be protected in the enjoyment of the same.

4. That there shall be reserved land not exceeding 150,000 acres for General George Rogers Clarke, his soldiers and officers.

5. That there shall be further reservation of land bounties for officers and soldiers on Continental and State establishments.

Congress uniformly recognized the inviolability of these conditions, and within two months after the cession, to-wit, April 29, 1784, by resolution called the attention of the States still holding western lands to the fact of former resolution of Congress asking for cessions; and "in presenting another request for further cessions" states (speaking of persons who had furnished supplies to carry on the war): "These several creditors have a right to expect that funds shall be provided on which they may rely for their indemnification; that Congress still considers vacant territory as an important resource, and that, therefore, the said States be earnestly pressed, by immediate and liberal cessions, to forward these necessary ends, and to promote the harmony of the Union." The land laws of the United States further show that all these conditions have been strictly complied with. If further illustration were needed that the United States considered itself irrevocably bound by the terms of the cession, it is found in the resolution of Congress of July 7, 1786, asking of Virginia certain alterations in the deed of cession in the following language:

> " '*Resolved*, That it be, and it hereby is, recommended to the Legislature of Virginia to take into consideration their act of cession, and revise the same so far as to empower the United States in Congress assembled to make such a division of the territory of the United States northerly and westerly of the River Ohio, into distinct Republican States, not more than five or less than three, as the situation of that country and future circumstances may require; which States shall hereafter become members of the Federal Union, and have the same rights of sovereignty, freedom and independence as the original States, in conformity with the resolution of Congress of the 10th of October, 1780.' "

The ordinance of July 13, 1787, providing for the government of this territory, also embraced the proposition covered by the above resolution and Virginia accepted this modification by leg-

islative act of December 31, 1788. One condition, however, of the deed of cession has never been fulfilled by Congress. This condition forms the basis of Virginia's claim to compensation, and is in the following language:

> "*That all the lands within the territory so ceded to the United States, and not reserved for, or appropriated to, any of the before-mentioned purposes, or disposed of in bounties to the officers and soldiers of the American army, shall be considered as a common fund for the use and benefit of such of the United States as have become, or shall become, members of the confederation or federal alliance of the said States, Virginia inclusive, according to their usual respective proportions in the general charge and expenditure, and shall be faithfully and bona fide disposed of for that purpose, and for no other use or purpose whatsoever.*"

In the background of any discussion of a breach by the nation of the conditions just set forth lies the relation of the government on the one hand and the States carved out of this territory on the other, with respect to what was known as the Public Domain situated within the borders of these States. Congress in its various acts providing for the creation of these States reserved to itself not only the control, but the absolute ownership of this Public Domain, and the States mentioned had no more control over it for purposes of disposition or otherwise than if it were located on the Atlantic seaboard. This consideration is of vital importance, because the nation by its acceptance of Virginia's deed of cession became the sole and exclusive owner of many millions of acres of unoccupied and unappropriated lands within this territory, lands that have not been appropriated to any one of the five uses expressly set forth and authorized in the Virginia deed of cession. If follows, therefore, that the nation became also the trustee of these unappropriated lands, and its duties as such trustee compelled it in law and in equity to account to the original thirteen States in respect of any use or disposition made thereof contrary to the sixth condition, also expressly set forth in said deed of cession and in equal degree binding upon the nation.

This condition along with the others was accepted by the nation, and unless annulled by the concurrence of the high contracting parties or rendered void by the adoption of the Constitution of the United States, adopted after the cession was made, furnishes a valid basis of claim on the part of Virginia.

There has been no legislation by the State or by Congress altering in any respect this condition and attention is called to the fact that the Constitution of the United States, so far from rendering void this condition or in any way affecting its integrity, has reaffirmed it by the following provisions:

Article IV, section 3, "Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States or of any particular State."

And Article VI:

"All debts contracted, and engagements entered into, before the adoption of the Constitution, shall be as valid against the United States under the Constitution as under the confederation."

IV.

The Basis and Extent of Compensation to Virginia.

It is to be constantly observed that any of this territory or the proceeds thereof disposed of by the United States contrary to the express condition in the deed of cession *"shall be considered as a common fund for the use and benefit of such of the United States as have become or shall become members of the Confederation, or Federal alliance of the said States, Virginia inclusive, according to their usual respective proportions in the general charge and expenditures, and shall be faithfully and bona fide disposed of for that purpose and for no other use or purpose whatsoever."*

The first inquiry forcing itself upon the mind on a careful scrutiny of this language is, why did Virginia in making this reservation include all the thirteen States as beneficiaries in this trust? Having title to this vast region, with unlimited power of

alienation, why did she not compel the nation to become trustee for her sole and exclusive benefit, instead of acting in such capacity for the benefit of the entire thirteen States? This question may only be intelligently resolved by a consideration of the Articles of Confederation and the legal relation of the States thereto. At the time Virginia by legislative act made her offer of cession upon terms which she knew would be acceptable to the National Government, Maryland had not ratified the Articles of Confederation, and, since these Articles constituted a perpetual union among *thirteen States*, this ratification by *twelve States alone* did not give them force and effect over even the twelve. Therefore, the language in the Virginia *offer* of cession, afterwards incorporated in the deed of cession, "shall be considered a common fund for the *use and benefit, of such of the United States, as have become or shall become* members of the Confederation or Federal alliance," was evidently designed to secure the immediate ratification of Maryland. Another reason why the thirteen States were included in the benefits of the reservation grew out of the fact the Continental Congress was experiencing great difficulty in getting the various States to supply their proportion of the amounts assessed against them for the common defense, pursuant to resolution of Congress of October 14, 1777. Some of the States were not responding promptly in meeting their share of the burden of the Revolutionary War, and Virginia rightly concluded that, by making the less important States joint beneficiaries with herself, "*according to their usual and respective proportions in the g neral charge and expenditures*," all the States would more promptly meet the expenses of the war, and that thus the Continental Congress would be provided with funds necessary to bring the war to a successful close. Her statesmen doubtless reasoned that the States securing by the sword the independence of the nation, should also be the beneficiaries of her bounty. This view is strengthened by the reflection that there was no power delegated to Congress by the Articles of Confederation respecting the ownership or control of public domain. The government created by the Articles was a mere creature of the States with limited powers of agency. The States alone in their individual capacity had the right to own and

govern territory, and this right as above pointed out was guaranteed to them by the Articles of Confederation.

From this premise the conclusion of necessity follows that the States in their sovereign capacity having the power to own territory, might also become in their individual capacities the beneficiaries of the trust contemplated by Virginia's deed of cession.

The Constitution of the United States not yet having been adopted, and the idea of the States being members of a Federal alliance that was little more than a partnership operating upon the mind of Congress, the latter (History of Public Domain, p. 196) on October 10, 1780, ordered that the land ceded to the United States should be disposed of for the common benefit of the United States, and granted or settled at such time and under such regulations as shall hereafter be agreed on by the United States in Congress assembled, or by any nine or more of them.

On May 20, 1785, the Continental Congress passed an ordinance (repealed in part of July 9th, 1788) providing for disposition of lands in this territory.

Under this ordinance the Board of Treasury (the Treasury Department prior to and under the Confederation: See ordinances of Congress of February 17, 1776, of July 30, 1779, and of May 28, 1784), consisting of three commissioners, were to receive the plats of surveys, from the geographer (now survey general) in charge of surveys. The Secretary of War was then to draw by lot certain townships for land bounties for the use of the Continental Army and the Board of Treasury was to draw the remainder by lot in the name of the thirteen States, respectively, who were to advertise and sell them at public sale for not less than $100 per acre."

Clearly, as pointed out by Dr. Robert B. Fulton in his pamphlet on the "Virginia Land Cession of 1784," the provision for drawing certain tracts in the name of the thirteen States was a move toward carrying out the last specific condition in the Virginia deed cession.

The following extract is taken from the History of the Public Domain, pp. 200-205.

"On March 3, 1795, Congress, by law provided, that 'the net proceeds of the sales of lands belonging, or which shall hereafter belong, to the United States in the western territory thereof,' should constitute a portion of the sinking fund of the United States for the redemption of the public debt.

"On May 18, 1796, Congress passed the act for the sale of the land of the United States in the territory northwest of the River Ohio, providing for the sale of the surveyed lands in sections of 640 acres, at not less than $2.00 per acre, the proceeds to be paid to the Treasury of the United States.

"The general policy of land legislation by Congress was, for the first thirty years, to meet exigencies by temporary enactments from time to time. This policy was continued down to the period of the passage of the pre-emption act of 1841."

Dr. Fulton aptly remarks:

"Under this policy Congress fell into the habit of donating lands freely and liberally in the territory ceded by Virginia, apparently without considering whether or not the conditions of this cession were being fully fulfilled by such donations and grants for local benefit. As the result of this indefinite policy the lands in the territory ceded by Virginia have been practically all disposed of by the United States without any adjustment or settlement of Virginia's reserved interest therein."

The land granted by Congress to Ohio, Indiana, Illinois, Michigan, Wisconsin or to persons in those States for local uses all in direct violation of the sixth condition in Virginia's deed of cession, may be stated under the following heads:

1. For public schools, one square mile in each township to the legislatures of these five States.

2. For seminaries in each of these States (and more in Ohio and Wisconsin) seventy-two square miles.

3. For public roads and other internal improvement 3 per cent. of the receipts for sales of public lands by the United States to Indiana, Illinois, and Ohio, and 5 per cent. of such sales to Michigan and Wisconsin.

4. Internal improvements, 500,000 acres to each State.

5. For canal construction purposes, 4,424,073 acres.

6. For military roads, 523,000 acres.

7. Land grants to railroads to these States and the corporations therein, 9,504,861 acres.

8. Salt springs and saline lands, 214,371 acres.

9. Under the swamp act Congress gave to these States 11,406,841 acres.

10. Special grants for local improvements and for other sundry purposes, 100,000 acres.

Similar grants in Minnesota amounted to 5,529,000 acres. This makes the total of 38,864,189 acres thus disposed of by the National Government contrary to the express terms of Virginia's deed of cession, and in a manner that gave no "use" or "benefit" to Virginia and the other thirteen States, as set forth therein, or one-fifth of the lands ceded.

To the above 38,864,189 acres must be added 119,479,204 acres disposed of by the United States as a part of the public domain. This will more fully appear from the following admirable table taken from Dr. Fulton's paper:

	Acres
"The total area surveyed by the United States in the States formed in the Virginia cession, as above shown, amounted to	170,208,613
The total granted for local uses was	38,864,189
Total granted in bounties to soldiers	11,865,220
	50,729,409
	170,208,613
	50,729,409
Balance sold or to be sold	119,479,204

It is not possible without a careful scrutiny of the original records bearing upon the sale of the public lands to estimate with accuracy the amount received by the Government from

these sales. It is beyond the scope of this paper to make inquiry as to the value to be placed upon these lands in considering Virginia's right to compensation. When it is considered, however, that the total area disposed of by the National Government, contrary to the express reservations in the Virginia deed of cession, amounts to 158,343,391 acres, it becomes manifest that, whatever system of accounting is adopted, the total claim of the original thirteen states, to which Virginia's share, based upon her proportion "of the general charge and expenditure," would be one-seventh, would approximate the sum of $200,000,000. West Virginia and Kentucky, being parts of Virginia at the time of the deed of cession, would be entitled to an equitable accounting from Virginia for anything the latter may receive by way of compensation.

V.

Has Virginia Lost Her Claim to Compensation by Reason of Laches?

The defense of laches is peculiar to courts of equity and may be said to be founded on lapse of time and staleness of claims where no statute of limitations directly governs the case and is addressed to the sound discretion of the court. There are several well-known exceptions to the operation of this doctrine, only two of which need be adverted for the purposes of this discussion.

(*a*) *Laches Not Imputable to a Sovereign.*

The only modification of this rule is where a sovereign government descends from its position of sovereignty and enters the domain of commerce—a modification that has no reference to the case under consideration.

The Supreme Court of the United States has uniformly adhered to this rule, and in the case of *Armstrong* v. *Morrill*, 14 Wall. 120, thus expressed it: No laches is to be imputed to the government and against it no time runs so as to bar the public

rights, which is no more and no less than another form of words for expressing the ancient rule of the common law that time does not run against the State."

This rule was given a more extended definition in the case of *Metropolitan Railroad Co.* v. *District of Columbia*, 132 U. S. 1, decided 1889, the following extract being taken from the opinion of Mr. Justice Bradley:

> "No restrictive laws apply to the sovereign unless so expressed. And especially no laws affecting a right on the ground of neglect or laches, because neglect and laches cannot be imputed to him. And it matters not whether the sovereign be an individual monarch, or a republic, or a State. The principle applies to all sovereigns. The reason usually assigned for this prerogative is that the sovereign is not answerable for the delinquencies of his agents. But whatever the true reason may be, such is the general law—such the universal law, except where it is expressly waived. The privilege, however, is a prerogative one and cannot be challenged by any person inferior to the sovereign, whether that person be natural or corporate."

(*b*) *Defense of Laches Not Open Where There is no Judicial Remedy.*

While under the Tucker and Bowman acts the Court of Claims is the proper forum to which certain loyal citizens may submit for adjudication claims previously authorized to be submitted by Congress against the government for damages to or loss of property growing out of the Civil War and otherwise, yet no tribunal has been established and no law passed whereby the United States has agreed to respond to the suit of a sovereign State. To remedy this situation a bill was introduced in the Senate on April 10, 1912, by Senator Chilton, of West Virginia, conferring jurisdiction upon the Court of Claims to hear and determine the joint and several claims of Virginia and the other thirteen States, also inclusive of West Virginia and Kentucky, against the United States growing out of Virginia's deed of cession of March 1, 1784, and providing "that an

appeal may be taken from the findings of said court, both as to the law and facts, to the Supreme Court of the United States as in other cases."

The Court of Claims in *Balmer* v. *U. S.*, 26 C. Cl., 82, 88, said there could be no laches where there was no enforcible legal right.

It will be sufficient in closing this aspect of the matter to cite a single decision of the Supreme Court of the United States, when that court in the case of *Amy* v. *Watertown*, 130 U. S., 320, 325, speaking through Mr. Justice Bradley, said: "There is one class of cases which is excluded from the operation of the statute (referring to the Statute of Limitations) by act of law itself, . . . *This class embraces those cases in which no action can be brought at all* (italics mine), either for want of parties capable of suing, or because the law prohibits the bringing of the action. In such cases the general law operates as a qualification, a tacit condition of the particular statute."

It may also be suggested that this conveyance with respect to the condition or reservation was made upon an express and continuing trust, which is as follows: "And shall be faithfully and *bona fide* disposed of for that purpose and no other." The government by taking possession of these lands became a trustee, and the possession of the trustee, under the circumstances, is presumed to be the possession of the *cestui que* trust—in this case the original thirteen States. Besides, it was not until a recent date that the last of these lands were disposed of by Congress.

VI.

The Authorship and Importance of the Ordinance of July 13th, 1787.

It has been remarked that history may yet adjudge the year 1787 as the greatest in our annals. In that year the Continental Congress, sitting in New York, and on the eve of adjournment forever gave us the ordinance of the Northwest, and the Constitutional Convention, sitting in Philadelphia, gave us the Con-

stitution of the United States. John Fiske, in his "Critical Period of American History, declares that we can only understand how the nation was formed by studying the creation of the national domain between the Mississippi and the Alleghanies.

Daniel Webster in his celebrated reply to Hayne, said: "I doubt whether one single law of any law-giver, ancient or modern, has produced effects of more distinct, marked and lasting character than the ordinance of 1787."

Senator Hoar, in his oration at the Centennial Founding of the Northwest at Marietta, Ohio, in 1888, spoke of the ordinance, along with the Declaration of Independence and the Constitution, as "one of the three title deeds of American Constitutional liberty."

Judge Cooley, after a life spent in the territory carved out of this cession, said: "No charter of government in the history of any people has so completely withstood the tests of time and experience; it was not only a temporary adaptation to a particular emergency, but its principles were for all time and worthy of acceptance under all circumstances. It has been a fitting model for all subsequent government in America."

Too many elements entered into the history of this remarkable document to warrant any attempt to fix its authorship upon any one individual in the same manner that the honor of drafting the Virginia Bill of Rights may be justly awarded to George Mason.

There are several aspirants to the authorship of its most distinctive feature, to-wit, the slavery proviso. Webster in his reply to Hayne in 1830 claimed the honor for Nathan Dane, of Massachusetts, while Mr. Hayne and Thomas H. Benton claimed it for Jefferson, and President King, of Columbia University, claimed it for his father, Rufus King. The fact is that the slavery proviso appeared in the very first draft of an ordinance for the government of this territory, a draft still extant, and in the handwriting of Jefferson, submitted to the Continental Congress by Jefferson in his form of a report on the very day of the Virginia cession. While the proviso was at that time stricken out, yet it later appeared in the ordinance of 1787, which became the permanent government of the territory. It is not surprising that

the draft offered by Jefferson should make slavery forever impossible in this region. His whole life had been arraigned against the institution, as to which he said in his notes on Virginia, "I tremble for my country when I reflect that God is just, and that His justice cannot sleep forever." In the full vigor of young manhood as a member of the Virginia House of Burgesses in 1767, he had caused a resolution to be introduced looking to the emancipation of slaves. New lustre would have been added to the Declaration of Independence, which Lord Brougham said should be hung in the cabinets of kings, if his attack upon this institution had not been stricken out when it appeared in its final form. We are prepared, therefore, for the wide scope of the pioneer suggestion contained in his original draft of ordinance, when, at the age of 41, in the full tide of manhood's prime, and with prophetic instinct, he asked Congress not only to exclude slavery from the territory northwest of the Ohio, but also south and east of that river. It is reasonable to suppose that if this feature had become a part of the organic law of the nation thus early in its history, that slavery would have been excluded from all subsequent territorial acquisitions of the United States. Indeed, this very proposition of Jefferson to restrict the territorial area of slavery and thus let it die a natural death, constituted the main plank in the platform of the Republican party upon its organization. It was upon his advocacy of this plank that Mr. Lincoln became President of the United States. It may be well within the realm of conjecture, but surely no violence is done to the imagination to reflect that if this principle had been adopted upon the threshold of our national existence there would have been no abolition party, no Missouri Compromise, no Free Soil Platform, no question of squatter sovereignty, no Dred Scott decision and no Civil War.

In concluding observations upon this interesting document, we may without danger of overstepping the truth adopt the language of Schouler, "Here, as in the fundamental verities of the Declaration of Independence, Jefferson's name blazons the record."

It has seemed not inappropriate to direct attention in this brief manner to the unique place this ordinance occupies in our history, for without the cession of Virginia there would have been nothing upon which the ordinance could operate, and hence no occasion for its enactment, and without the ordinance an imperishable chapter in our history would never have been written. Moreover, no apology need be made for the suggestion that the issues involved in the contest from '61 to '65, now happily beyond the realm of controversy, would have had a far different ending if the North in that Titanic struggle had been deprived of the resources of the great States of Ohio, Indiana, Illinois, Michigan, Wisconsin and Minnesota east of the Mississippi—territory ceded to the nation in an hour of peril without coercion and without compensation by the spirit and patriotism of the old Commonwealth. In view of this generous contribution to the glory of the Republic, Virginians may well be pardoned if they fail to see the justice of the dismemberment of their territory involved in the creation without her consent and against her protest of the western portion of the State into the sovereign State of West Virginia, an act made possible only by the strong arm of the National Government at a time when Virginia was engaged with all her resources in defending the rights guaranteed to her by the Constitution of the United States and the laws passed in pursuance thereof—an act not even justified as a war measure, according to Mr. Blaine in his "Twenty Years in Congress." This brilliant statesman, who cannot be charged with bias in favor of the South, advocated the payment of a portion of Virginia's debt by the nation, because of the signal act of injustice involved in singling out this State for a punishment that was not administered in equal or in any measure upon any other member of the confederacy. Mr. Blaine further suggested that, although Virginia was a public enemy while the war lasted, she was entitled to as magnanimous treatment as was accorded Mexico, to whom the nation paid under the terms of the treaty of Guadalupe Hidalgo the sum of $15,000,000 for territory that the former was compelled to surrender as a result of the triumph of American arms. No claim against the nation has even been urged by the State for this crowning act of humiliation. Instead

she has proceeded in an orderly manner to submit for adjudication to the Supreme Court of the United States her claim against West Virginia for her just proportion of the debt existing at the time of the dismemberment and the findings of that court, while not yet concluded, have already established the justice and the validity of her right to compel the payment by West Virginia of a just proportion of this debt. Be it observed that this litigation now pending is between two independent States, and we are presented with the amazing spectacle of sovereign rights being submitted for adjustment to the due and orderly process of the law, with the complete assurance that, however large the judgment finally rendered, it will be satisfied without the necessity of putting in motion any of the machinery of that august tribunal for its enforcement. The reason for such a situation is found in the fact that these great States are convinced that the members of this court in all the conclusions reached will meet out even and impartial justice to the respective litigants, and that no obligation will be imposed by its judgment upon either State repugnant to justice or inconsistent with sovereignty.

All that is contemplated by the resolution of Senator Chilton above referred to, which resolution, I am informed, has the full approval of the Senators from Virginia, is to so extend the jurisdiction of the Court of Claims as to confer upon the States interested the same rights of bringing suits against the government as is now accorded individuals. This tribunal was established in recognituion of the lofty principle that no corporation, Indian tribe or individual having claims against the United States should be without a tribunal in which those claims could be adjudicated. Shall this same privilege be withheld from a sovereign State? The resolution does not contemplate or anticipate what the findings of the court may be, but simply confers upon it jurisdiction to hear and determine the rights of the States interested growing out of the cession of Virginia of March 1, 1784, with the right of ultimate appeal to the Supreme Court of the United States. True, the claim, if established, may be large, but upon a full understanding of the situation is it conceivable that the resolution will not meet with the approval of the representatives in the National Congress of the

States carved out of this territory? Is it conceivable that the States that have come into the Union since, now constituting a majority, it is true, themselves the beneficiaries in a larger sense of this signal act of generosity and inheritors of a common destiny, would oppose the submission of the rights of Virginia and her sister State, to a tribunal, which, whatever might be said of its imperfections, still stands before the world as the most important and impressive court of justice? Is it conceivable that the nation would refuse to have its own rights in the matter thus adjudicated at a time when such a large body of thinking and influential citizens are looking forward to the establishment at an early day of an international tribunal, with our own Supreme Court as a model, to which, in lieu of the arbitrament of the sword, may be submitted all questions, including those of so-called national honor, arising among the nations of the earth?